



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-0448-17

WILLIAM RHOMER, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
BEXAR COUNTY**

WALKER, J., filed a concurring opinion.

CONCURRING OPINION

Appellant, William Rhomer, was convicted of felony murder stemming from an automobile-motorcycle collision, with the predicate felony being felony driving while intoxicated. At trial, over Appellant's objection, a police detective testified and provided an opinion on how and precisely where the collision occurred. The court of appeals found that the admission of this testimony was not an abuse of discretion and upheld Appellant's conviction. Under the circumstances, the trial

court did not abuse its discretion, and I agree with the Court's conclusion today that the court of appeals correctly upheld the trial court's ruling. However, the court of appeals reached that conclusion through an erroneous review, and the majority compounds this error by upholding it. To the extent the Court's decision upholds the trial court's ruling, I concur. I disagree with the Court's opinion holding that the court of appeals correctly evaluated the reliability of Doyle's opinion under the *Nenno* standard instead of the *Kelly* standard. Actual accident reconstruction is a hard science, and the reliability of actual accident reconstruction opinions should be judged under *Kelly*. I respectfully decline to join the majority opinion. I will note that I agree that an accident reconstructionist may, in some situations, testify to an expert opinion that is not actual accident reconstruction. Such opinions may be analyzed under the *Nenno* standard. However, Detective Doyle's opinion in this case as to who caused the accident is not such an opinion.

I — Standard of Review

A trial court's ruling in the admission or exclusion of evidence is reviewed for an abuse of discretion. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018); *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). The trial court's decision will be upheld if it is reasonably supported by the record and correct under any theory of law applicable to the case. *Willlover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). An abuse of discretion in admitting evidence occurs when the decision is so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005). In other words, abuse occurs only if the reviewing appellate court can say, with confidence, that no reasonable perception of the matter under consideration could have yielded the decision made by the trial court. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). This consideration is made

in light of what was before the trial court at the time the ruling was made. *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009); *Martin v. State*, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005).

II — Information Before the Trial Court

Here, the trial court's decision was not an abuse of discretion because the information before the trial court, at the time of the ruling admitting Detective Doyle's opinion testimony, was insufficient to apprise the trial court that Detective Doyle's opinion should have been excluded as inadmissible. Trial counsel failed to ask Doyle the right questions, and trial counsel failed to make the right arguments to show the trial court that Doyle's opinion as to the location of the accident was unreliable.

For example, trial counsel failed to question Doyle about the basis for his opinion that the location of the debris was the location of the area of impact. Perhaps counsel may have thought Doyle was correct, because counsel did not consider the possibility that the debris, much like the motorcycle itself, could have changed direction as a result of the collision with Appellant's automobile. Counsel may also have neglected to consider the possibility that the debris could have been carried by the automobile before falling onto the roadway. During the voir dire examination, counsel did not question Doyle about other possible theories of how the collision occurred, such as if the motorcycle turned into Appellant's lane and how the damage to the vehicles could have been consistent with that theory. Furthermore, counsel did not ask Doyle if Appellant could have made a sharp left turn to try and avoid the collision. Counsel also did not ask Doyle if the collision with a motorcycle would have caused Appellant's vehicle to veer to the left due to the impact, unlike a collision with a pedestrian or a collision with a bicycle. Counsel did not ask Doyle if the damage to

Appellant's automobile would have also contributed to any veer to the left.

Also, assuming the scaled diagram created by Doyle was accurate,¹ and assuming Appellant, as asserted by Detective Doyle, simply continued straight from his starting position and failed to make the turn, then Appellant's vehicle would have crossed into the westbound lane at a point farther to the east than the indicated location of the debris. Counsel nevertheless failed to question Doyle about this. In addition, if Appellant truly did fail to make the gradual curve in the road and drifted into the westbound lane, counsel should have asked Doyle if the motorcycle would have had plenty of time to swerve out of the way of Appellant's vehicle in order to avoid the collision.

Finally, trial counsel did not have an accident reconstruction expert witness of his own to question the reliability of Doyle's opinion.

Plainly stated, counsel did not give the trial court any reason to believe Doyle's opinion was incorrect or unreliable. Counsel did not subject Doyle's opinion to sufficient scrutiny. Had counsel done so, the trial court, in all likelihood, would not have allowed Doyle to provide his opinion as to the cause of the collision. Because the trial court's ruling was not an abuse of discretion, I agree with the Court's decision today to affirm the court of appeals's judgment upholding the trial court's ruling. Nevertheless, I disagree with the analysis by the court of appeals and by this Court affirming the court of appeals.

III — Reliability: *Kelly* or *Nenno*

The court of appeals erred in evaluating the reliability of Detective Doyle's opinion under *Nenno* because actual accident reconstruction is not like a *Nenno* "soft" science, but is rather closer to the "hard" sciences which are subject to *Kelly*. In *Kelly*, we laid out the standard for determining

¹ Attached as Appendix A to this opinion.

whether an expert's scientific opinion was reliable: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). In *Nenno*, we laid out a looser standard for opinions about "soft" sciences such as psychology. See *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998). We explained the difference between "hard" sciences and "soft" sciences in *Weatherred v. State*:

The "hard" sciences, areas in which precise measurement, calculation, and prediction are generally possible, include mathematics, physical science, earth science, and life science. The "soft" sciences, in contrast, are generally thought to include such fields as psychology, economics, political science, anthropology, and sociology.

Weatherred v. State, 15 S.W.3d 540, 542 n.5 (Tex. Crim. App. 2000). To gauge the reliability of an expert opinion in a "soft" science under *Nenno*, "[t]he appropriate questions are: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field." *Nenno*, 970 S.W.2d at 561.

In this case, the court of appeals decided that *Nenno* analysis was appropriate because Detective Doyle's accident reconstruction was not based upon a scientific inquiry (because he declined to analyze speed) and was based upon his training and experience. *Rhomer v. State*, 522 S.W.3d 13, 22 (Tex. App.—San Antonio 2017, pet. granted). I believe carving science away in this manner was error. Even if Detective Doyle did not bother making any speed calculations, his opinion as to the cause of the crash and where the crash occurred are still, in my view, scientific inquiries.

Nenno is appropriate "[w]hen addressing fields of study aside from the hard sciences, such as the social sciences or fields that are based primarily upon experience and training as opposed to

the scientific method.” *Nenno*, 970 S.W.2d at 561. In that situation, “*Kelly*’s requirement of reliability applies but with less rigor than to the hard sciences.” *Nenno*, 970 S.W.2d at 561. *Nenno*’s application depends on whether the *field* is characterized as primarily based upon training and experience. The qualification of *the witness* (his or her training and experience) is irrelevant to question of whether *Kelly* or *Nenno* applies. Nevertheless, the court of appeals determined that *Kelly* analysis did not apply because Detective Doyle did not perform any scientific analysis and because he had training and experience. In other words, the court of appeals, finding Detective Doyle qualified as an expert, allowed his choice to avoid scientific analysis to dictate that accident reconstruction was not a scientific query and thus should be measured under *Nenno*.

The field of actual accident reconstruction appears to be based firmly in hard science, and the *Kelly* standard should be the one to evaluate the reliability of an accident reconstruction witness’s opinion. It involves precise measurement, calculation, and prediction. *See Weatherred*, 15 S.W.3d at 542 n.5. Indeed, the purported reconstruction in this case included measurements in Detective Doyle’s use of the Sokkia surveying device to map out the locations of objects at the accident site. Reconstruction also involves calculations and predictions. Detective Doyle acknowledged, on cross-examination, that car-to-car accident reconstruction and car-to-motorcycle accident reconstruction involved different physics, different science, and different mathematical principles.² The fact that the physics, science, and mathematical principles are different between the two types of cases necessarily means that there is some kind of physics, science, and mathematics involved in car-to-motorcycle accident reconstruction. Detective Doyle’s own testimony would place actual accident reconstruction, whether car-to-car or car-to-motorcycle, as a hard science. *See id.* (hard sciences

² Rep. R. vol. 4, 74.

include mathematics and physical sciences). Yet the court of appeals and the majority of this Court conclude that motorcycle-accident reconstruction is a soft science like economics and psychology subject to the *Nenno* standard.

For comparison, our cases where we examined the expert opinion’s reliability under *Nenno* involve fields such as:

- Weapon focus,³
- Grooming of children for sexual molestation,⁴
- Eyewitness identification,⁵
- Satanism,⁶
- Future dangerousness,⁷ and
- “Filicide.”⁸

In contrast, our cases examining the expert’s testimony under *Kelly* involved testimony about:

- Abusive head trauma,⁹
- DNA,¹⁰

³ *Blasdell v. State*, 470 S.W.3d 59 (Tex. Crim. App. 2015).

⁴ *Morris v. State*, 361 S.W.3d 649 (Tex. Crim. App. 2011).

⁵ *Tillman v. State*, 354 S.W.3d 425 (Tex. Crim. App. 2011); *Weatherred v. State*, 15 S.W.3d 540 (Tex. Crim. App. 2000).

⁶ *Davis v. State*, 329 S.W.3d 798 (Tex. Crim. App. 2010).

⁷ *Davis v. State*, 313 S.W.3d 317 (Tex. Crim. App. 2010); *Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005); *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010); *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998).

⁸ *Gallo v. State*, 239 S.W.3d 757 (Tex. Crim. App. 2007).

⁹ *Wolfe v. State*, 509 S.W.3d 325 (Tex. Crim. App. 2017).

¹⁰ *Jenkins v. State*, 493 S.W.3d 583 (Tex. Crim. App. 2016); *Jackson v. State*, 17 S.W.3d 664 (Tex. Crim. App. 2000); *Hinojosa v. State*, 4 S.W.3d 240 (Tex. Crim. App. 1999); *Massey v. State*, 933 S.W.2d 141 (Tex. Crim. App. 1996); *Campbell v. State*, 910 S.W.2d 475 (Tex. Crim. App. 1995); *Flores v. State*, 871 S.W.2d 714 (Tex. Crim. App. 1993); *Hicks v. State*, 860 S.W.2d 419

- Gas Chromatograph Mass Spectrometer testing,¹¹
- Enzyme-Multiplied Immunoassay Technique (EMIT) testing,¹²
- Retrograde extrapolation,¹³
- Medical testimony in sexual assault cases,¹⁴
- Protocol in operating Intoxilyzer breath test device,¹⁵
- Urine analysis for marijuana by an ADx device,¹⁶
- Toolmark examination,¹⁷
- Intoxilyzer,¹⁸
- Eyewitness identification (pre-*Nenno*),¹⁹
- Horizontal gaze nystagmus (HGN) test,²⁰ and
- Fingerprint-comparison.²¹

In some cases, we did not consider the expert opinion evidence under a particular standard. In *Roberts*, the expert opinion involved the relationship between alcohol and drug abuse and violence. *Roberts v. State*, 220 S.W.3d 521, 527–31 (Tex. Crim. App. 2007). We found that we did not need

(Tex. Crim. App. 1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

¹¹ *Bekendam v. State*, 441 S.W.3d 295 (Tex. Crim. App. 2014).

¹² *Somers v. State*, 368 S.W.3d 528 (Tex. Crim. App. 2012).

¹³ *Bigon v. State*, 252 S.W.3d 360 (Tex. Crim. App. 2008); *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001).

¹⁴ *Vela v. State*, 209 S.W.3d 128 (Tex. Crim. App. 2006).

¹⁵ *Reynolds v. State*, 204 S.W.3d 386 (Tex. Crim. App. 2006).

¹⁶ *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim. App. 2003).

¹⁷ *Sexton v. State*, 93 S.W.3d 96 (Tex. Crim. App. 2002).

¹⁸ *Hartman v. State*, 946 S.W.2d 60 (Tex. Crim. App. 1997).

¹⁹ *Jordan v. State*, 928 S.W.2d 550 (Tex. Crim. App. 1996).

²⁰ *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994).

²¹ *Russeau*, 171 S.W.3d 871.

to classify the evidence under either the “hard” or “soft” science headings. *Id.* at 530. In *Coble*, we examined the reliability of the offered expert opinion on future dangerousness under both *Daubert/Kelly* and *Nenno*. *Coble v. State*, 330 S.W.3d 253, 272–279 (Tex. Crim. App. 2010).

Finally, unlike the Fourth Court of Appeals, other courts of appeals have looked at accident reconstruction as a “hard” science subject to *Kelly* analysis. *See Pena v. State*, 155 S.W.3d 238, 246 (Tex. App.—El Paso 2004, no pet.); *Wooten v. State*, 267 S.W.3d 289, 303–04 (Tex. App.—Houston [14th Dist.] 2008, pet. ref’d). Instead of upholding the Fourth Court of Appeals’s decision that *Nenno* applies, I think the Eighth Court of Appeals and the Fourteenth Court of Appeals had the correct conclusion that *Kelly* applies.

IV — Reliability Under *Nenno*

Assuming, for the sake of argument, that it was proper to employ the *Nenno* standard, I believe the court of appeals misapplied the standard. The court of appeals found Doyle’s opinion reliable, under *Nenno*, because he reached his opinion based on his experience and specialized training. That is not the standard under *Nenno*. Under *Nenno*, “[t]he appropriate questions are: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert’s testimony is within the scope of that field, and (3) whether the expert’s testimony properly relies upon and/or utilizes the principles involved in the field.” *Nenno*, 970 S.W.2d at 561.

Assuming *Nenno* applies, the first two questions are easily resolved. There is no argument that accident reconstruction is not a legitimate field of expertise, and clearly Detective Doyle’s testimony regarding how the accident occurred and where the area of impact was located is within the scope of accident reconstruction. Thus, the matter falls under the third *Nenno* question: whether Detective Doyle’s testimony properly relied upon and/or utilized the principles involved in the field.

“Under either *Daubert/Kelly* or *Nenno*, reliability should be evaluated by reference to the standards applicable to the particular professional field in question.” *Coble*, 330 S.W.3d at 274. “The objective of the ‘gatekeeping’ requirement is to make certain that an expert employs the same professional standards of intellectual rigor in the courtroom as is expected in the practice of the relevant field.” *Id.* at 276. “The validity of the expert’s conclusions depends upon the soundness of the methodology.” *Id.* at 276–77.

Thus, if Detective Doyle is going to offer an opinion as an expert on accident reconstruction involving a motorcycle and an automobile, he needs to be held to the standards of intellectual rigor as is expected in the practice of the field.

What did Detective Doyle do as part of his investigation and reconstruction?

He walked around the scene, measured distances between objects using the Sokkia device, and generated a map displaying the Sokkia data. He explained that neither the Sokkia device nor the generated map analyze the data to reconstruct a crash scene, which is where the human element—the accident reconstructionist—would be involved.

Detective Doyle, in voir dire, stated that he did not apply any kind of scientific theory to the case.²² However, shortly thereafter in response to a similar question, he said:

A. I can tell you that the motorcycle was pushed backwards by the car based on its mass. That’s some scientific theory. Beyond that, that’s pretty much it.²³

Accepting, for the sake of argument, that Detective Doyle was qualified as an accident reconstructionist for motorcycle collisions, his testimony did not properly rely upon the principles

²² Rep. R. vol. 3, 331.

²³ Rep. R. vol. 3, 332.

of the field. His opinion could be rephrased as: “I saw debris at this location, I saw some curb strikes, and based upon my training and experience, the impact must have occurred where the debris was.”

I believe Detective Doyle’s opinion—that the motorcycle collision occurred where the debris was located because that was where the debris was located—was not reliable as an expert opinion and the court of appeals erred by determining that it was. However, as previously mentioned, trial counsel’s cross-examination of Detective Doyle in voir dire examination was so deficient that the trial court was not made aware that Detective Doyle’s opinion was not reliable, which leads to my conclusion that the trial court’s ruling was not an abuse of discretion.

V — Is Detective Doyle’s Opinion Correct?

Finally, I have concerns that Detective Doyle’s opinion—that the crash occurred because Appellant continued straight through the turn on Nakoma, left his eastbound lane, crossed into the westbound lane, and struck the motorcycle in the westbound lane—could potentially be incorrect as a matter of fact.

After reviewing the testimony, the photographs, and the diagram created by Detective Doyle,²⁴ I believe that it is just as likely that Appellant did not leave his lane, and instead it was the motorcycle which was out of position and was struck in the eastbound lane of Nakoma.

I agree with Detective Doyle that Appellant’s car, upon striking the motorcycle, lifted the motorcycle up instead of pushing it down. As Doyle testified, if Appellant’s car pushed the motorcycle down, there would have been a visible gouge mark in the road. The motorcycle at that point lifted up off the road, reversed direction, and was pushed backward into the parking lot where it landed and slid along the pavement of the parking lot.

²⁴ Attached as Appendix A to this opinion.

Detective Doyle's opinion is that the location of the debris is necessarily in the lane where the impact occurred. However, I believe that such an assumption would almost certainly be incorrect. I believe that the debris created by the collision was also in motion after the crash. At the moment the motorcycle lifted up, reversed direction, and was thrown into the parking lot, the debris itself was likely lifted up, reversed direction, and thrown some distance in the same general direction that the motorcycle was thrown. As noted in the Court's opinion, Detective Doyle testified that he believed that the debris from the motorcycle was found in front of the area of impact because he believed the momentum of the debris carried it in the direction in which the motorcycle was traveling at the time of impact. I question how Detective Doyle could come to the conclusion that the debris continued going westbound, when the collision caused the motorcycle itself and the decedent to reverse direction and go eastbound into the parking lot. Certainly, the debris has less mass than either the motorcycle or the decedent, and, making the reasonable assumption that the motorcycle, the debris which was part of the motorcycle, and the decedent who was riding the motorcycle were all traveling at the same westbound velocity prior to the collision, the motorcycle and the decedent would have each had a much greater westbound momentum than the debris. Detective Doyle did not explain why the westbound momentum of the debris was so different from the westbound momentum of the motorcycle or the decedent that it was not overcome by the collision with Appellant's vehicle. I believe Appellant's vehicle could have carried the debris a considerable distance in the eastbound direction before the debris fell to the ground. My guess is that the debris was carried several yards from the point of impact in the same direction the motorcycle was thrown before it came to rest on the pavement, placing the area of impact in Appellant's lane. But I will admit that this is an educated guess at best, just as Detective Doyle's conclusion as to the area of impact was an educated guess

at best. Neither Detective Doyle nor I used any accepted mathematical calculations or scientific principles to determine how the difference in weight of the two vehicles, the speed of the motorcycle, the speed of the automobile, the mass of the motorcycle, the mass of the automobile, or the angle of the impact could have affected the result. I suspect there are several other factors that could affect how far the different items of debris traveled after the impact. Detective Doyle admitted that he did not use any mathematical calculations to determine the point of impact. He admitted that he did not perform any speed calculations of either vehicle. He did not have any training in motorcycle/automobile accident reconstruction that would allow him to determine how the big difference in weight and mass of the two vehicles would affect a determination of a precise area of impact. He admitted that his opinion as to the area of impact was primarily based on the location of the debris. He did not even mention the possibility that the debris may have been pushed by the car after the impact before the debris fell to the pavement. Doyle stated that his opinion was based on his training and experience. However, he had no training in motorcycle/automobile accident reconstruction, and he certainly did not have any training that would allow him to come to the conjectural conclusion that the debris landed on the pavement at the exact location of the area of impact.

There is no doubt in my mind that an accurate determination as to the precise area of impact in this case could not be made by any person who did not have specialized training in motorcycle/automobile accident reconstruction, which would include all the factors that can have an effect on debris traveling after a collision and what kinds of mathematical calculations would be necessary to determine an accurate area of impact. Detective Doyle's conclusion was not based on any science, let alone accepted science in the field of motorcycle/automobile accident reconstruction.

His conclusions were certainly unreliable and, in my opinion, very likely factually incorrect. Without any analysis or scientific calculations from Detective Doyle indicating otherwise, it may be just as possible that the driver of the motorcycle was turning onto the side street and was actually struck in Appellant's lane. Again, trial counsel's cross-examination of Detective Doyle in voir dire examination was so deficient that the trial court was not made aware that the debris was likely carried a significant distance before falling to the pavement, which leads to my conclusion that the trial court's ruling was not an abuse of discretion.

VI — Conclusion

In conclusion, the court of appeals, in upholding the trial court's ruling admitting the testimony by Detective Doyle employed erroneous analysis by employing *Nenno* analysis instead of *Kelly* analysis. The majority today allows the court of appeals's error to stand, and for that reason I respectfully decline to join the majority opinion and its conclusion that actual accident reconstruction is a "soft science" subject to *Nenno* evaluation instead of as a "hard science" subject to *Kelly* evaluation. However, the trial court did not abuse its discretion in admitting the evidence, because counsel failed to effectively elicit and argue why Doyle's opinion was unreliable. Because the trial court did not abuse its discretion under these circumstances, I concur in the result.

Filed: January 30, 2019
Publish

APPENDIX A

San Antonio Police Department

Intoxication Manslaughter

Drawn By Det. J Doyle #2401	Date Drawn 5/2/2012	Incident Date: 5/2/2012	Location: 200 E Nakoma	12-095214
				Scale 1" = 40.52'

